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In the Supreme Court of the United States

OCTOBER TERM, 1982

EDWARD LEE HORTON, a/k/a "CORNBREAD" HORTON

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. May the Government, pursuant to §3161(h)(6) of the Speedy Trial Act, deny a Defendant's right to thirty (30) days preparation time for trial on a valid indictment under the Speedy Trial Act by seeking its own dismissal of an invalid original indictment and substituting for it a "barely sufficient" reindictment six (6) days before trial, before the trial court rules on Defendant's outstanding motion to dismiss the original indictment?

2. Do §§3161(c), (d) and (h) of the Speedy Trial Act guarantee a Defendant thirty (30) days preparation time in the event of a reindictment or in the event of applicable exclusions under §3161(h) as decided by the Ninth Circuit Court of Appeals in *United States* v. *Arkus*, 675 F.2d 245 (9th Cir. 1982) as opposed to the Seventh Circuit's decision to the contrary in this case?

NAMES OF PARTIES

In addition to the Defendant, Edward Lee Horton, a/k/a "Cornbread" Horton, and the Plaintiff, United States of America, Bragster G. Horton was a defendant in the proceeding involved in the Seventh Circuit Court of Appeals. Bragster Horton has not joined in this Petition for Writ of Certiorari.

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CITATION TO OPINIONS BELOW

The judgment on review was printed in a slip opinion issued by the Seventh Circuit Court of Appeals on April 29, 1982, and appears in the *Federal Reporter* at 676 F.2d 1165. No opinions by the Trial Court were published. The Seventh Circuit's Opinion is reprinted in the Appendix to this Petition.

JURISDICTION

1. The date of entry of the judgment sought to be reviewed was April 29, 1982.

2. A rehearing and rehearing en banc were denied on July 21, 1982. A Petition for Extension of Time to file a Petition for Writ of Certiorari was granted by this Court until and including October 19, 1982 on September 8, 1982.

3. There is statutory jurisdiction for this action pursuant to 28 U.S.C. §1254(1).

APPLICABLE STATUTES

Chapter 208—Speedy Trial

18 U.S.C.—Time Limits and Exclusions.

* * *

(c)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate on a complaint, the trial shall commence within seventy days from the date of such consent.

(c)(2) Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

(d)(1) If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed

against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

* * *

(h)(1) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—

* * *

(F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

* * *

(H) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable.

* * *

(h)(6) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same

offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

Chapter 42—Extortionate Credit Transaction

18 U.S.C. §891—Definitions and Rules of Construction

For the purposes of this chapter:

(1) To extend credit means to make or renew any loan, or to enter into any agreement, tacit or express, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred.

(2) The term "creditor", with reference to any given extension of credit, refers to any person making that extension of credit, or to any person claiming by, under, or through any person making that extension of credit.

(3) The term "debtor", with reference to any given extension of credit, refers to any person to whom that extension of credit is made, or to any person who guarantees the repayment of that extension of credit, or in any manner undertakes to indemnify the creditor against loss resulting from the failure of any person to whom that extension of credit is made to repay the same.

(4) The repayment of any extension of credit includes the repayment, satisfaction, or discharge in whole or in part of any debt or claim, acknowledged or disputed, valid or invalid, resulting from or in connection with that extension of credit.

(5) To collect an extension of credit means to induce in any way any person to make repayment thereof.

(6) An extortionate extension of credit is any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person.

(7) An extortionate means is any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person.

(8) The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and territories and possessions of the United States.

(9) State law, including conflict of laws rules, governing the enforceability through civil judicial processes of repayment of any extension of credit or the performance of any promise given in consideration thereof shall be judicially noticed. This paragraph does not impair any authority which any court would otherwise have to take judicial notice of any matter of State law.

18 U.S.C. §894—Collection of Extensions of Credit by Extortionate Means

(a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means

(1) to collect or attempt to collect any extension of credit, or

(2) to punish any person for the nonrepayment thereof, shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

(b) In any prosecution under this section, for the purpose of showing an implicit threat as a means of collection, evidence may be introduced tending to show that one or more extensions of credit by the creditor were, to the knowledge of the person against whom the implicit threat was alleged to have been made, collected or attempted to be collected by extortionate means or that the nonrepayment thereof was punished by extortionate means.

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence, at the time the extension of credit in question was made, of the circumstances described in section 892(b)(1) or the circumstances described in section 892(b)(2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing that words or other means of communication, shown to have been employed as a means of collection, in fact carried an express or implicit threat, the court may in its discretion allow evidence to be introduced tending to show the reputation of the defendant in any community of which the person against whom the alleged threat was made was a member at the time of the collection or attempt at collection.

STATEMENT OF FACTS

1. Trial Court Proceedings.

Edward Horton was indicted with multiple offenses of extortionate collection of credit in a 15 count indictment filed September 24, 1980.[1] Although involving six different victims at four different times spanning several months,

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[1] Specifically violations of the following U.S. criminal statutes were alleged. 18 U.S.C. §§894, 924(c), 1952(a)(2) and 891.

the indictment contained no names of any of the victims, no location of any of the alleged crimes, nor any explanation whatsoever regarding the extensions of credit involved in the extortion offenses.[2] At a bond reduction hearing held two days later, the United States Attorney informed the Court and Defendant that the alleged extensions of credit involved in Counts I-VI related to a dispute over stolen goods.

> "One other comment that I would advise the Court as to the incident of July of '79 is that these two individuals were not unknown to Mr. Horton and to the co-Defendants, the other associates who were there. In fact, they had been business associates of Mr. Horton in the sense that the purpose of their trip to Mr. Horton's that day was to deliver stolen merchandise, and they had done that in a—on previous occasions. *The argument about the debt and the amount owing to Mr. Horton arose out of their relationship with Mr. Horton in the disposing of stolen merchandise.*"
> (Tr. 9/26/80, p. 24) (Emphasis added)

However, at trial the Government contended that the alleged extension of credit involved approximately seven bad checks and approximately ten to fifteen others given for the sale of heroin. The Supplemental Record filed by the Government on Appeal in this case revealed that the Government had knowledge of these checks and the subject matter for which they were given at least a month prior to the indictment. (Motion to Supplement the Record on Appeal, filed October 14, 1981)

During the pretrial proceedings, the Defendant was hospitalized for thirty days at Springfield, Missouri, from

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[2] For a representative sample of the Counts included in the indictment, see note 1 in Judge Swygert's dissent in the Seventh Circuit's opinion contained in the Appendix to this Petition at p. 18.

October 7 to November 7, 1980. On November 7, he was returned to Springfield, Illinois, but then was immediately transferred by the Government to a jail in Danville, Illinois (120 miles away from Springfield). On November 10, 1980, the trial court denied a request by Defendant's counsel to make him available to counsel in Springfield so that they could prepare for the trial set for November 24, 1980.

In the meantime (October 23 and October 8, respectively), Defendant's counsel had filed a motion to dismiss the indictment and a bill of particulars requesting the names of the victims and the nature of the threats made. On November 10, 1980, the Government provided Defendant with the names of the victims involved but refused to provide any other information to specify what was the subject matter, amounts or dates of the extensions of credit for the offenses involved in the indictment. On November 14, 1980, hearings were held on Defendant's Motion to Dismiss, his Motion for Continuance and on all other pending motions. At that time, the trial court indicated that Defendant's Motion to Dismiss the Indictment had considerable merit but declined to rule on the motion in order to allow the Government an opportunity to try to find authorities which would distinguish authorities relied on by Defendant.[3]

The Government did try to find some authorities which would meet Defendant's objections based on the First Circuit's decision in *United States* v. *Tomasetta*, 429 F.2d 978 (1st Cir. 1970). (Government's Memorandum in Opposition to Defendant's Motion to Dismiss, filed November 18, 1980) But rather than risk an adverse ruling on De-

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[3] Judge Swygert has reprinted the pertinent portions of the trial judge's concern with the sufficiency of the indictment in his dissent found at p. 19, note 2, of this Appendix.

fendant's motion, the Government immediately procured a new indictment and sought its own dismissal of the original indictment stating *inter alia* that the "superseding indictments . . . serve only to provide more information to each Defendant in the indictment." (Notice of Filing of Superseding Indictments, ¶19, filed November 19, 1980, Case No. 80-30062) The trial court granted the Government's motion to dismiss the original indictment on November 21, 1980, and declined to rule on Defendant's prior motion to dismiss the original indictment. On the same date, the Defendant was arraigned on the superseding indictment and the trial court again denied Defendant's motion for a continuance and renewed the trial setting for November 24, 1980.[4]

On November 18 and 21, 1980, six and three days before trial, the Government disclosed to the Defendant for the first time the basis for its allegation of an extension of credit. On those dates, the Government released to the Defendant grand jury transcripts and copies of checks written by the victims for heroin purchases. (Motion to Supplement the Record filed by the Government in the Seventh Circuit Court of Appeals) The only indication given to the Defendant as to the nature of the extension of credit involved in the indictment at issue prior to that time was the reference to "stolen merchandise" at the bond reduction hearing. At trial, the Government conceded that disputes over stolen merchandise did not qualify as "extensions of credit" as defined by 18 U.S.C. §894, and

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[4] Several of the counts of the original indictment (Counts 7-15) were split off into separate indictments in the superseding indictments. Trial on these counts were deferred. Defendant was acquitted on the Counts tried on a later date on which he and his counsel had more time to prepare. No. 80-30063

relied solely on the bad checks for heroin purchases to satisfy that jurisdictional prerequisite.

On November 24, 1980, Defendant again filed motions for continuance based on the Speedy Trial Act and a motion to dismiss the superseding indictment. The trial court denied both motions and proceeded immediately to trial. At trial, the Defendant's principal defense to the shooting incident testified to by the two victims was that the reason for the shooting was because the Defendant was upset at the victims because they had allegedly stolen his washing machine.[5]

2. Appellate Court Proceedings.

After briefs and oral arguments, the Seventh Circuit released its opinion affirming Defendant's conviction on April 29, 1982, Judge Swygert dissenting. Defendant's counsel filed a Petition for Rehearing and Rehearing En Banc based in large part on a contrary decision issued by the Ninth Circuit Court of Appeals in *United States* v. *Arkus*, 675 F.2d 245, decided only six days prior to the Seventh Circuit's decision in this case. The Seventh Circuit ordered the Government to file a responsive brief. The United States Attorney's office in Springfield referred the matter to the Department of Justice in Washington because of the conflicting Ninth Circuit Court of Appeals' decision. In its brief, the Department of Justice acknowledged that it was partly responsible for the *Arkus* opinion because it took a position in that case which conflicts with the position taken in this case.

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[5] This is an abbreviated statement of facts of the shooting incident because this Petition for Writ of Certiorari does not involve those facts and the facts are recited in the Seventh Circuit's Opinion.

> "We acknowledge that the government is partly to blame for the confusing *Arkus* opinion. The government there took a position that we now believe is untenable and that conflicts with the position that we are taking here. We have been authorized by the Office of the Solicitor General to say that this brief accurately reflects the views of the Department of Justice. (Brief For The United States In Response To Appellants' Petition For Rehearing, p. 13, fn. 8)

The Seventh Circuit denied the Petition for Rehearing and Rehearing en Banc, with Judge Swygert dissenting and Judge Harlington Wood not taking part in the proceedings.

BASIS FOR FEDERAL JURISDICTION IN THE TRIAL COURT

Jurisdiction was asserted in the trial court for violation of the federal offenses of 18 U.S.C. §§894 and 924(c).

ARGUMENT

I.

CERTIORARI IS WARRANTED TO CLARIFY THE CONFLICTING APPROACHES TAKEN BY THE THIRD AND SEVENTH CIRCUITS TO CONSTRUCTION OF THE SPEEDY TRIAL ACT.

This case calls for this Court's intervention to clarify conflicting approaches to construction of the Speedy Trial Act and to make that construction consistent with the flexible interpretation requested by both houses of Congress. In 1979, Congress expressed repeated concern that the Speedy Trial Act was being interpreted in "an unnecessarily stringent manner".

> "The Committee is troubled to find evidence which suggests that, not only is the Act being interpreted to deny it most of its inherent flexibility, it remains practically 'noninterpreted.'
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> * * *
>
> The point of that example is that the principal actors in the Federal criminal justice system are, for a variety of reasons, interpreting those provisions of the Act in an *unnecessarily inflexible* manner.
>
> * * *
>
> *. . . Neither hostility toward the Act nor fear of the consequences is a justifiable basis for interpretation which is so strict as to deny the spirit of it as well as its letter in application.*
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> * * *
>
> The Committee must stress, at this juncture, that no amendment short of repeal and no amount of interpretive language could conceivably meet every objection and solve every problem arising from the Act's

> application in a practical setting. To attempt to do so would so construct the Act as to hamstring its inherent flexibility and defeat its principal aims as a consequence. While the Administrative Office has demonstrated diligence and good faith in its efforts to guide the districts toward a reasonable application of the Act in practice, *the Committee finds that, too often, the Administrative Office has erred on the side of caution. Legislative History of Title I of the Speedy Trial Act of 1974*, A. Partridge, pp. 111-112. (Emphasis added)

The Seventh Circuit's mechanistic construction of the Speedy Trial Act prevents application of §3161(d)(1) of the Act where the indictment was *tactically* dismissed on the Government's motion.[6] In reality the dismissal was attributable to the Defendant's motion to dismiss an invalid indictment which did not inform the Defendant or his counsel of the nature of the charges against him. Judicial approval of a tactic of re-indictment designed to prevent adequate preparation for trial is directly contrary not only to congressional intent that the spirit rather than the letter of the Act be followed, but also to the Third Circuit's recent opinion in *United States* v. *Rabb*, 680 F.2d 294 (3rd Cir. 1982), mandating a common sense practical interpretation to the Act.

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[6] The particular finding of the Seventh Circuit Majority was as follows:

> In this case, although Cornbread filed his motion before the government filed a superseding indictment and moved to dismiss the original indictment, the trial judge never decided Cornbread's motion. While we note that the trial judge indicated some preliminary doubts as to whether the original indictment was sufficient, we decline to speculate as to how the motion would have ultimately been resolved. Accordingly, the original indictment was not dismissed on the defendant's motion and, thus, § 3161(d)(1) is not applicable.

The Third Circuit's decision in *United States* v. *Rabb*, 680 F.2d 294 (3rd Cir. 1982), is diametrically opposed to the Seventh Circuit's decision in this case. In *Rabb*, the Government obtained a superseding indictment because of a technical defect in the original indictment.[7] The Defendant then moved to dismiss the superseding indictment because it was not brought within the mandatory thirty (30) day period allowed between arrest and indictment set forth in §3161(b) of the Speedy Trial Act. The Third Circuit Court of Appeals, rather than woodenly applying the provisions of the Speedy Trial Act as the Seventh Circuit did in this case, analyzed the purpose of the specific provision of the Act at issue.

> "Viewed in light of its purpose in the statutory scheme and with 'an eye to the surrounding statutory landscape,' United States v. Bass, 404 U.S. 336, 344 92 S.Ct. 515, 521, 30 L.Ed.2d 488 (1971), *we conclude that appellee's reading of §3161(b), although literally correct, is unsound*, and that the August 10 indictment met the requirements of §3161(b). *United States* v. *Rabb*, 680 F.2d 294, 296 (3rd Cir. 1982) (Emphasis added)

In *Rabb*, the Third Circuit specifically took on the task of *evaluating* the *sufficiency* of the *original indictment* to determine whether or not the defendant was unfairly prejudiced by the delay from the original arrest to re-indictment. Only after making specific findings that the original indictment was sufficiently detailed to inform the defendant of the *exact* nature of the charges he would have to defend against and that it was returned by an indepen-

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[7] The defect was that the Grand Jury's term had expired prior to the return of the indictment and the United States Attorney had neglected to obtain an order extending its term.

dent body based on a finding of probable cause, the Third Circuit held

> ". . . that in the absence of bad faith on the part of the government or prejudice to the defendant, an indictment returned by a grand jury whose term has expired is sufficient to toll Speedy Trial Act § 3161(b) if it is followed by a valid indictment, identical in all material respects." *United States* v. *Rabb*, 680 F.2d 294, 297 (3rd Cir. 1982)

Here the Seventh Circuit specifically *declined* to examine the validity of the original indictment, notwithstanding *material* differences between the two indictments, prejudice to the Defendant and Government bad faith in misleading defendant as to the nature of the charges.

The only distinction between the substantive evaluation and statutory construction of the Speedy Trial Act employed in *Rabb* and the Seventh Circuit's mechanistic approach employed in this case is that in *Rabb* the substantive evaluation to statutory construction was urged on behalf of the Government while here it is urged on behalf of the Defendant. Surely this Court in its supervisory role in the uniform administration of the federal criminal justice system, and as the final national arbiter of federal law, cannot allow such a distinction to stand.

Clarification of the proper approach that is to be used in statutory construction of the Speedy Trial Act is imperative at this time to guide the Courts of Appeal in their construction of the Act. The mandatory dismissal sections of the Speedy Trial Act, 18 U.S.C. §3162 only became effective to indictments filed after July 1, 1980. (18 U.S.C. §3163) This means that the Circuit Courts of Appeal are just beginning to be faced with what will surely be an avalanche of litigation regarding construction of the

Act. The question of whether a purely literal approach or an informed construction is to be given to the Speedy Trial Act will have to be faced repeatedly in the very near future. This Court's guidance is urgently needed, not only to clarify the conflict between the Third and Seventh Circuits' approaches to construction of the Act, but also to forestall a crazy quilt of conflicting approaches by all the Circuit Courts of Appeal in the near future.

The diametrically opposed positions taken by the Third and Seventh Circuits highlight the urgent need for this Court to fill the judicial vacuum noted by Congress in construction of the Act so that there can be an effective and consistent approach taken by the lower courts in construing the Act.

II.

REVIEW IS WARRANTED BY THIS COURT IN THE EXERCISE OF ITS SUPERVISORY ROLE TO PREVENT JUDICIAL EROSION ON CONGRESS' MANDATE TO ALLOW A DEFENDANT SUFFICIENT TIME TO ADEQUATELY PREPARE A DEFENSE.

This case also cries out for judicial review to prevent the Seventh Circuit's decision in this case from becoming a license to the Government to subvert Congress' express intent to allow a defendant additional time to prepare a defense where the Government has prepared an invalid indictment. The express wording of §§3161(d) and 3161 (c)(2) of the Speedy Trial Act is dispositive of Congress' intent to provide thirty (30) additional days to prepare for trial where an indictment is dismissed on motion of defendant. However, the result reached in this case is directly contrary to this express legislative intent *and* to the clear implication of this Court's recent decision in

United States v. *MacDonald*, ... U.S. ....., 102 S.Ct. 1497, 71 L.Ed.2d 696, n. 12 (1982), that the Government may not dismiss and later reinstitute charges to evade the Speedy Trial Guarantees.

Here the Government, now with the Seventh Circuit Court of Appeal's imprimatur, did precisely what was condemned in *MacDonald*. It sought dismissal of the original indictment and reinstituted new charges solely to avoid the mandate of the Speedy Trial Act guaranteeing a defendant the right to an additional period of preparation in the event of an invalid indictment or other matters mandating dismissal of the original indictment. The conduct of the Government in this case was, as Judge Swygert points out, deplorable. The Government requested the trial court to defer ruling on Defendant's motion to dismiss while it allegedly sought to find authorities which would support the original indictment. (Tr. 11/14/80, p. 40) Instead it sought a new indictment "to provide more information to each Defendant" thereby conceding the invalidity of the original indictment.[8] Until six days before trial, the Government concealed from the Defendant the essential element of the offense that the crime charged related to bad checks and nonrepayment of heroin debts. Until that time, the Government had affirmatively misled the Defendant into believing that the charges related to a dispute over stolen merchandise — not only was that a completely different crime from that which was alleged on the superseding indictment, but also it would not even be subject to federal jurisdiction as lacking the essential ele-

[8] This was further compounded by the Government's arguing that the validity of the original indictment was moot due to the fact it claimed that the deficiencies of the original indictment were now supplied in the superseding indictment.

ment of an extension of credit. *Perez* v. *United States*, 402 U.S. 146 (1971) At trial, the Defendant's whole defense was to contend that the shooting related to Defendant's dismay at the victims having stolen his washing machine. His attorney was taken by complete surprise by the new allegations of bad checks and narcotics transactions.

> "They changed the indictment now. They didn't give me a date when this transaction took place, when the credit was extended. They say the exact date unknown. They are saying there was a transaction involving narcotics. I haven't had any time since getting this indictment to discuss this with my client to find out if there's any truth to this particular indictment at all, and to what his particular defense would be. I am expected to go to trial Monday morning on this, and I—I just think that's grossly unfair. I won't have any chance to investigate whether he has alibi witnesses for these particular offenses, what he's talking about, whether there was any extension of credit at that time or not. It—it's just—it's inconceivable that they would want us to go to trial on such short notice and take it up. (Tr. 11/21/80, pp. 37-38)

This case demands exercise of this Court's supervisory responsibilities to prevent wholesale erosion of the Congress' intent in amending the Speedy Trial Act in 1979 to ensure adequate preparation time for trial. Allowance of the majority's decision of the Seventh Circuit to stand in this case authorizes the Government to file patently invalid indictments with no essentials of the offense and then substitute valid indictments for them on the eve of trial. This completely nullifies Congress' intent in making the amendments to the Speedy Trial Act in 1979 which added §3161(c)(2) to the Act. This section specifies that a defendant may not be forced to trial within less than thirty (30) days without his consent. This concern for

allowing a defendant adequate time to prepare his defense was reiterated over and over again in the Legislative History of the Act in *both* houses of Congress.

> "It is in recognition of the special problems often faced by defense counsel that the Department has included a provision in its bill requiring a minimum of 30 days for defense preparation. This insures the defendant of some minimum preparation time even in the simplest case.
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> * * *
>
> Both bills provide that trials cannot begin within 30 days unless the defendant consents. This provision is designed to give a defendant at least 30 days to prepare for trial and would prohibit a trial judge from setting a trial before that time.
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> * * *
>
> Other major areas of importance to all parties upon which agreement has been reached and which are included in the consensus substitute are as follows:
>
> * * *
>
> (2) guaranteeing the defendant a reasonable period in which to obtain counsel and prepare for trial—30 days from the date the defendant appears through counsel or elects to proceed *pro se*, unless the defendant waives the right conferred [§3161(c)(2)] . . .
>
> Prohibiting trial less than 30 days after the date the defendant appears in a position to begin preparing his defense more fully protects basic due process rights." *Legislative History of Title I of the Speedy Trial Act of 1974*, A. Partridge, pp. 71, 72, 73.

The Seventh Circuit's majority opinion authorizing the Government to subvert a defendant's preparation time by filing superseding indictments immediately before trial emasculates Congress' expressed concern for adequate

preparation time for trial and results in a blatant transgression of the Congressional purpose in adding §3161 (c)(2) to the Speedy Trial Act in 1979.

III.

REVIEW IS WARRANTED TO RESOLVE A DIRECT CONFLICT BETWEEN CIRCUITS ON CONSTRUCTION OF THE SPEEDY TRIAL ACT ON WHETHER THE EXCLUSIONS PROVIDED IN §3161(h) ARE APPLICABLE TO THE 30 DAY MINIMUM PERIOD AS WELL AS TO THE 70 DAY MAXIMUM PERIOD OF §3161(c).

The Seventh Circuit Court of Appeals and the Ninth Circuit Court of Appeals have come to diametrically opposed positions on the question of whether the exclusion periods provided in §3161(h) of the Speedy Trial Act, 18 U.S.C. §3161(h), are applicable to the thirty (30) day minimum trial preparation period set forth in §3161(c)(2) of the Act as well as to the seventy (70) day maximum indictment to trial limitation set forth in §3161(c)(1) of the Act. In this case, the Seventh Circuit determined that neither the Defendant's applicable exclusions under §3161 (h) nor the fact of reindictment was sufficient to toll the minimum thirty (30) day preparation period provided by §3161(c)(2) of the Speedy Trial Act.[9] However, in *United*

[9] According to the provisions of §3161(h), Defendant had at least two exclusions which were applicable to him in determining the maximum seventy (70) day limitation period under §3161(c)(1). Defendant's thirty (30) day hospitalization was excludable under §3161(h)(1)(H) and an additional fourteen (14) days, during which the trial court held the Defendant's motion to dismiss under advisement, was excludable under §3161(h)(1)(F). Therefore, there were only sixteen (16) days of nonexcludable time between the time of the Defendant's first appearance with counsel on September 25, 1980 and the time of trial on November 24, 1980.

States v. *Arkus*, 675 F.2d 245 (9th Cir. 1982) the Ninth Circuit Court of Appeals came to precisely the opposite conclusion.

> "It [the Government] argues also that Arkus' trial began at the earliest possible time because it could not begin after reindictment for 30 days, absent an express waiver. 18 U.S.C. §3161(c)(2) (Supp. III 1979). Because we agree with the latter contention, we need not address what constitutes an 'essential witness.'
>
> * * *
>
> In the case of a reindictment, a defendant may in fact need less time to prepare his defense because some preparation was undertaken before the original indictment was dismissed. Nevertheless, given that the period between dismissal of the original indictment and reindictment may be considerable, *we believe Congress intended that the 30-day period apply also in cases of reindictment. United States* v. *Arkus*, 675 F.2d 245, 247-8 (9th Cir. 1982) (Emphasis added)

The *Arkus* opinion also decided that the thirty (30) day minimum preparation time was also equally applicable to other exclusion periods provided in §3161(h). In making this conclusion, the Ninth Circuit relied on the explicit Legislative History of the Act.

> "See note 3 supra. The Senate Committee Report accompanying the amendments adding the 30 day provision states:
>
> > *It is the Committee's intent that the exclusions provided in Section 3161(h) apply to the 30-day minimum to-trial provision.* Therefore, if an event occurs which would automatically exclude time under subsection (h), . . . that time is not only excluded from computing the time within which the trial must occur . . . but time would also auto-

> matically be excluded in computing the 30-day minimum period of time, during which the judge could not schedule trial without the defendant's consent.
>
> A. Partridge, Legislative History of Title I of the Speedy Trial Act of 1974, at 73-74 (1980). *United States* v. *Arkus*, 675 F.2d 245, 248 (9th Cir. 1982) (Emphasis added)

Review by *certiorari* is the only way to clarify this important conflict in application of the Speedy Trial Act. As the *Arkus* case indicates, the issue appears both in cases in which a defendant is seeking a continuance and in which he is alleging violation of his right to a speedy trial. Trial courts throughout the country are placed at the horns of a dilemma: if they follow the Ninth Circuit's decision ensuring that a defendant has thirty (30) days preparation for trial, they will automatically be in violation of the Seventh Circuit's determination that a defendant must be brought to trial within seventy (70) days of an original indictment. This can only create judicial chaos in the ubiquitous speedy trial issues that are now appearing in the lower Courts.[10] Certiorari is warranted to clarify this fundamental difference between circuits.

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[10] Another sign of the burgeoning conflict is the Fourth Circuit's very recent decision in *United States* v. *Wooten*, ≠81-5266-81-5268, decided September 3, 1982. There the Fourth Circuit decided exclusions provided in §3161(h) of the Act were not applicable to the minimum thirty (30) day preparation period set forth in §3161 (c)(2) notwithstanding the contrary legislative history and the Ninth Circuit's opinion in *United States* v. *Arkus*, 675 F.2d 245 (9th Cir. 1982).

CONCLUSION

The Seventh Circuit's majority opinion rendered in this case manifests a blatent erosion of Congress' intent to provide a defendant with adequate preparation time for trial. It is inconsistent with the Third Circuit Court of Appeals construction of the Speedy Trial Act and with that of the Ninth Circuit Court of Appeals. Review by this Court is warranted to clarify these inconsistencies and for all of the reasons stated herein. The defendant respectfully requests that this Court grant certiorari to review these important issues.

Respectfully submitted,

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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 81-1155 and 81-1489

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EDWARD LEE HORTON, a/k/a "CORNBREAD" HORTON,

Defendant-Appellant.

No. 81-1178

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BRAGSTER G. HORTON,

Defendant-Appellant.

Appeals from the United States District Court for the Central District of Illinois, Springfield Division.

No. 80-30062—J. Waldo Ackerman, *Judge.*

Argued December 2, 1981—Decided April 29, 1982

Before SWYGERT, *Senior Circuit Judge,* PELL and BAUER, *Circuit Judges.*

BAUER, *Circuit Judge.* Edward "Cornbread" Horton and his brother, Bragster, challenge their conviction of

numerous crimes connected with extortionate collection practices. We affirm.

On September 24, 1980 a fifteen count indictment was returned against Cornbread, Bragster, and four others. Cornbread was charged in ten counts of extortionate collection practices in violation of 18 U.S.C. § 894; use of a firearm to commit a felony in violation of 18 U.S.C. § 924; interstate travel in aid of racketeering in violation of 18 U.S.C. § 894; and making extortionate loans in violation of 18 U.S.C. § 894. Bragster was charged in two counts of aiding and abetting the extortionate collection practices.

Both men pleaded not guilty and filed motions to dismiss the indictment, challenging it for lack of specificity. These motions were taken under advisement and trial was set for November 24, 1980. On November 18, 1980, before the trial court had ruled on the pending motions, a six count superseding indictment was returned and the original indictment was dismissed.[1] The superseding indict-

---

[1] A representative count of the superseding indictment stated:

COUNT 1

On or about the 6th day of July, 1979, in the Central district of Illinois, at 2128 East Monroe Street, Springfield, Illinois

EDWARD LEE HORTON,

having on previous occasions, the exact dates unknown, extended credit to Curtis H. Hardy arising from the sale of narcotics, did knowingly, willfully and unlawfully participate in the use of extortionate means to attempt to collect from Custis H. Hardy said extension of credit, the amount of which was in dispute, and to punish Curtis H. Hardy for the nonrepayment thereof, in that EDWARD LEE HORTON expressly and implicitly threatened the use of violence and other criminal means in causing harm to the person of Curtis H. Hardy in that EDWARD LEE HORTON shot Curtis H. Hardy in the left leg with a firearm.

All in violation of Title 18, United States Code, Section 894.

ment charged Cornbread with two counts of extortionate collection practices and two counts of using a firearm to commit extortion. Bragster was again charged with aiding and abetting extortionate practices.

Pursuant to the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.*, defendants moved for a continuance of the trial date. The court denied the motions and the trial commenced three days after Cornbread and Bragster had been arraigned on the superseding indictment.

The victims, Curtis Hardy and James Conkrite, testified for the government under a grant of immunity. Their uncontradicted testimony showed that both Hardy and Conkrite were heroin addicts who frequently purchased heroin from Cornbread. During 1979 Hardy made numerous purchases of heroin, often paying Cornbread with checks on which he forged his father's signature. Three of these checks were honored by the bank. Subsequently, the bank discovered the forgery and refused to honor four later checks. Cornbread had additional checks from Hardy which he had never attempted to cash. Hardy promised Cornbread that he would reimburse Cornbread for the amount of the bad checks. In addition, on at least one occasion, Cornbread gave Conkrite $150 worth of heroin on credit.

By July 1979 Hardy and Conkrite owed Cornbread between $700 and $800 for the heroin he had supplied. On July 5, 1979 Hardy and Conkrite went to Cornbread's house with an air conditioner which they hoped Cornbread would accept in partial payment of their debt. Cornbread agreed. During their negotiations Cornbread pulled out a pistol and a machine gun and with the aid of another man forced Hardy and Conkrite into the basement where

they were kept under constant watch at gunpoint by Cornbread, Bragster, and two other men. Cornbread berated his two victims for owing him money and hit the men with a pistol and a blackjack. A few hours later Cornbread shot Conkrite in the left knee. As he was going to shoot Hardy, who had both legs together, Bragster told Hardy to move his legs apart so he would not be shot in both knees. Cornbread then shot Hardy in one knee. During the time Hardy and Conkrite were held captive, Bragster urged them to "tell the man [Cornbread] what he wants to know."

The wounded men remained in the basement until Bragster put a tourniquet on Hardy's leg and assisted both men up the stairs. They then drove themselves to the hospital where they were admitted for medical treatment. When Hardy and Conkrite were interviewed by the police, they claimed that the shooting occurred on the street as they were trying to fix their truck.

The jury found Cornbread and Bragster guilty on all counts. Cornbread was sentenced to sixty years imprisonment, receiving the maximum sentence for each count to be served consecutively. Bragster was sentenced to four months imprisonment and four years and eight months probation.

Cornbread and Bragster (collectively Cornbread) filed a joint appeal assigning numerous errors. Initially, Cornbread challenges the sufficiency of both the original and the superseding indictments. Second, he alleges that the trial court's refusal to continue the trial date after the superseding indictment was returned violated the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.* Third, he claims that the government instruction defining "knowingly" was er-

roneous. Fourth, Cornbread contends that the evidence was insufficient to show that he engaged in the collection of credit by extortionate means or that his brother aided and abetted any extortionate activities. Finally, Cornbread assigns two errors concerning his sentence, contending that the trial court improperly imposed two separate sentences for one extortionate act and abused its discretion by imposing the maximum sentence for each count. None of these arguments has merit.

I

Cornbread claims that both the original and superseding indictments lack specificity because they contain little information about the alleged extensions of credit. The original indictment did not specify the amount of the credit extended or when these extensions were made. It identified the victims only by initials. The superseding indictment, premised on the same theories of prosecution as the original indictment, contained the full names of the victims and added the fact that the extensions of credit involved narcotics, but provided no information concerning the amounts or dates of the extensions of credit.

Cornbread argues that the omission of the approximate times, dates, and amounts of the alleged extensions of credit seriously hampered his ability to prepare a defense, precluding him from asserting that there had been no extensions of credit, that any debt had already been extinguished, or that the assault was not connected with the debt. He argues that a valid indictment must state the essential elements of the offenses charged as well as a statement of facts and circumstances relating to each element. Relying on *United Staes* v. *Cecil*, 608 F.2d 1294 (9th Cir. 1979), and *United States* v. *King*, 587 F.2d 956 (9th

Cir. 1978), he concludes that the indictment was impermissibly vague and ambiguous.

The purpose of an indictment is to provide the accused with a sufficient description of the offenses charged so that the accused will be able to prepare a defense. *United States* v. *Cecil*, 608 F.2d 1294, 1296 (9th Cir. 1979). Generally, an indictment is sufficient if it contains the essential elements of each offense charged. *United States* v. *King*, 587 F.2d 956, 963 (9th Cir. 1978). However, mere tracking of the statutory language is insufficient where additional information is necessary to provide the accused with a clear understanding of the specific charges against him. *United States* v. *Cecil*, 608 F.2d 1294, 1297 (9th Cir. 1979).

Our reading of the superseding indictment convinces us that, although perhaps less detailed than desirable, it is nevertheless sufficient. Clearly, the superseding indictment contained sufficient information to notify Cornbread that he was being charged with selling heroin to Hardy and Conkrite on credit and then threatening them with firearms and other acts of violence when they failed to repay him. Thus, not only was Cornbread advised of the essential elements of the offenses with which he was charged, *see United States* v. *Gambino*, 566 F.2d 414 (2d Cir. 1977), *cert. denied*, 435 U.S. 952 (1978), but unlike the indictment found to be insufficient in *United States* v. *Tomasetta*, 429 F.2d 978 (1st Cir. 1970), the superseding indictment here identified the victims by name and precisely located and described the violent acts of extortion. Since the superseding indictment specifically informed Cornbread that the extensions of credit arose from drug transactions, we do not believe that the lack of detail concerning the times and amounts of the extensions of credit

which subsequently precipitated the violent acts in any way hampered the preparation of Cornbread's defense.

United States v. *Cecil*, 608 F.2d 1294 (9th Cir. 1979), and *United States* v. *King*, 587 F.2d 956 (9th Cir. 1978), relied upon by Cornbread, are inapposite. The indictment in *Cecil*, unlike the indictment against Cornbread, failed to identify any overt acts and specifically alleged only the state in which the offense was committed and the names of some of the co-conspirators. In *King* the indictment omitted essential elements of the crime. In contrast, the indictment here not only alleged the essential elements of each offense charged but provided substantially more information than the indictments in either *Cecil* or *King*. We conclude that the superseding indictment against Cornbread and Bragster was not fatally defective.

II

Cornbread challenges the trial court's denial of a thirty day continuance after the superseding indictment was returned on the grounds that the denial: (1) violated the Speedy Trial Act, 18 U.S.C. § 3161(c)(2) and (d); and (2) was an abuse of the court's discretion. Neither of these arguments withstands analysis.

Both parties agree that the question of whether the time limitation in 18 U.S.C. § 3161 begins to run anew with reindictment turns on which party is responsible for dismissal of the original indictment, but they disagree as to which party was responsible for the dismissal in this case. The statute provides that if the defendant is responsible for the dismissal, subsection (d)(1) is triggered and the defendant is entitled to another thirty day period before trial. On the other hand, subsection (d) does not apply if the government obtains the dismissal. In that

case, the time limitation begins to run with the original indictment. *United States* v. *Dennis*, 625 F.2d 782 (8th Cir. 1980).

Cornbread asserts that while technically the original indictment was dismissed on the government's motion, in actuality the government's actions were in response to his earlier motion to dismiss the indictment. He reasons that the original indictment was dismissed on his own motion, thereby triggering § 3161(d)(1). Cornbread discounts the government's reliance on *United States* v. *Dennis*, 625 F.2d 782 (8th Cir. 1980), and *United States* v. *Sebastian*, 428 F. Supp. 967 (W.D.N.Y.), *aff'd on other grounds*, 562 F.2d 211 (2d Cir. 1977), arguing that neither *Dennis* nor *Sebastian* was decided in a situation where, as here, the indictment was dismissed upon the motion of the prosecutor after the defendant had contended that the indictment was invalid.

The mere filing of a defendant's motion to dismiss an indictment does not trigger subsection (d)(1); the right to a new thirty day time period is dependent upon a favorable ruling on that motion. In this case, although Cornbread filed his motion before the government filed a superseding indictment and moved to dismiss the original indictment, the trial judge never decided Cornbread's motion. While we note that the trial judge indicated some preliminary doubts as to whether the original indictment was sufficient, we decline to speculate as to how the motion would have ultimately been resolved. Accordingly, the original indictment was not dismissed on the defendant's motion and, thus, § 3161(d)(1) is not applicable.

Subsection 3161(h)(6), on which the government relies, does not specifically address the question of whether a

new thirty day time period begins to run after the government has dismissed its own indictment and returned a superseding one. Rather, subsection 3161(h)(6) controls a situation where there is an interval between the time the original indictment is dismissed on the government's motion and the superseding indictment is returned. In that situation, the time limitation is tolled during the period when no indictment is outstanding. *United States* v. *Dennis*, 625 F.2d 782 (8th Cir. 1980).[2]

There was no time gap between the two indictments returned in this case. Nevertheless, a fair implication of the statute is that reindictment for the same offense is permissible and that the time period begins to run with the first indictment. *United States* v. *Sebastian*, 428 F. Supp. 967, 973 (W.D.N.Y.), *aff'd on other grounds*, 562 F.2d 211 (2d Cir. 1977). Therefore, the district court's denial of a new thirty day continuance was not a violation of the Speedy Trial Act.

Similarly, there is no merit to Cornbread's contention that denial of a continuance was an abuse of discretion. The record reveals that the trial judge carefully weighed the rights of both sides, giving Cornbread ample opportunity to show how he would be prejudiced if he was required to proceed to trial. Tr. of Hearing on Pre-Trial Motions at 24-30. Cornbread was unable to show any

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[2] We note that the analysis in *United States* v. *Dennis*, 625 F.2d 782 (8th Cir. 1980), did not involve an interpretation of either section 3161(d) or 3161(h)(6). In *Dennis* the court stated that "[t]he real issue is whether the court abused its discretion in determining that the ends of justice served by . . . [granting the government's request for a continuance] . . . outweighed the best interest of the public and the defendant in a speedy trial," *id.* at 794, and arrived at its conclusion by applying § 3161(h)(8)(A).

prejudice. Indeed, the record indicates that, at the time of the superseding indictment, Cornbread already knew the names of the victims and had had an opportunity to interview them. These facts, considered in conjunction with the fact that the superseding indictment charged the same offense as the original indictment while reducing the counts against Cornbread from ten to six, establish that the denial of the continuance worked no detriment to him.

III

The next consideration is whether the giving of the government's instruction defining "knowingly" constituted plain error. Cornbread did not object to this instruction in the trial court. However, relying on *United States* v. *Winston*, 558 F.2d 105 (2d Cir. 1977), Cornbread now asserts that the giving of this instruction was reversible error because it permitted a finding of guilt for any wrongful motivation for the violent acts, whereas the law requires that the extortionate means must be motivated by an attempt to collect an extension of credit or to punish for nonrepayment.

We cannot agree. As the government points out, Cornbread reads the instruction in isolation rather than in conjunction with the other instructions, as it should be read. The government instruction on the issues and burden of proof expressly stated that there could be a finding of guilt only upon proof, beyond a reasonable doubt, that the defendant knowingly participated in the use of extortionate means to collect or attempt to collect an extension of credit.

United States v. *Winston*, 558 F.2d 105 (2d Cir. 1977), does not support Cornbread's argument. In *Winston*, in-

volving § 2 of the Railway Labor Act, 45 U.S.C. § 152, the trial judge instructed the jury that the defendant's conduct was willful "if it was performed knowingly, intentionally, purposefully, or deliberately." 558 F.2d at 107. Since the statute required the voluntary and intentional violation of a known legal duty, the appellate court concluded that this instruction was erroneous because more was required to establish mens rea, for purposes of the Railway Labor Act, than mere consciousness or awareness. Thus, the plain error in *Winston* was not a failure to link the willful action to the other elements of the crime, but a failure to define "willful" properly. In contrast, we find that the instruction defining "knowingly" and the instruction on the issues and burden of proof considered in tandem correctly stated the law.

IV

Defendant contends that the evidence is insufficient to sustain his conviction of extortionate collection practices or Bragster's conviction as an aider and abettor. The thrust of his argument is that neither conviction can stand because the evidence does not establish that the shootings were connected with an attempt to collect an extension of credit or to punish the men for their nonrepayment. In fact, Cornbread insists that there is no evidence that he extended credit to Hardy or Conkrite. Alternatively, he claims that even if he had extended credit to Hardy or Conkrite, the evidence indicates that he shot them for reasons other than their failure to pay their debts.

At the outset, we note that the statute defines extension of credit very broadly and includes any agreement to defer repayment of a debt. *United States* v. *Mase*, 556 F.2d 671

(2 Cir. 1977), *cert. denied,* 435 U.S. 916 (1978).[3] The record reveals that: (1) Hardy and Conkrite purchased heroin from Cornbread on numerous occasions, tr. at 54-61, 189; (2) Hardy had paid for much of his heroin with checks which bounced and he was indebted to Cornbread for the amount of the bad checks, tr. at 68; (3) Cornbread continued to accept checks in return for heroin even after some checks had bounced, tr. at 189; (4) Conkrite had received $150 worth of heroin from Cornbread which was still owing at the time of the shootings, tr. at 190; (5) Horton told Hardy he would give Hardy time to honor the checks, tr. at 68; (6) and Conkrite and Hardy brought the air conditioner to Cornbread to reduce the debt owed on the checks, tr. at 191.

We must evaluate this evidence in the light most favorable to the prosecution, deferring to the jury's weighing of the evidence and credibility determinations. *United States* v. *Niemiec,* 611 F.2d 1207 (7th Cir. 1980). In considering the sufficiency of the evidence, this court need only determine whether there is substantial evidence to support the verdict; we need not reweigh conflicting evidence. *United States* v. *Parnell,* 581 F.2d 1374 (10th Cir. 1978), *cert. denied sub nom. Cox* v. *United States,* 439 U.S. 1076 (1979). The undisputed evidence that Hardy had yet to honor the forged checks he gave Cornbread for the heroin is sufficient evidence to support the jury's finding that Cornbread extended credit to Hardy.

There is also substantial evidence to establish that Cornbread extended credit to Conkrite. Conkrite expressly stated, under oath, that Cornbread gave him $150 worth

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[3] It is clear that § 894 applies to loans other than loansharking types of loans. *United States* v. *Schaffer,* 539 F.2d 653 (8th Cir. 1976).

of heroin for which Conkrite had not paid on July 5th, the night of the shooting. Tr. at 189, 190, 115. In addition, the record is replete with statements from which the jury could reasonably infer that Hardy and Conkrite were partners who not only shared the heroin they each received from Cornbread, but also shared the cost of that heroin and that all parties involved believed Conkrite and Hardy to be equally responsible for the money owed. *See, e.g.*, tr. at 55-62, 189, 191. The evidence clearly supports the conclusion that both Hardy and Conkrite were indebted to Cornbread, and the fact that there is also some evidence to suggest that Cornbread never intended to extend credit and that his violence may have been triggered, in part, by the fact that his victims had stolen his washer and dryer does not compel a finding that the evidence was insufficient to sustain the convictions. *See United States* v. *Niemiec*, 611 F.2d 1207 (7th Cir. 1980).

We reject the argument that the evidence against Bragster merely showed that he was unable to prevent the shootings and, thus, cannot support a finding that he aided and abetted Cornbread's criminal acts. It is true, as defendant emphasizes, that Bragster never threatened or hurt the victims and that he administered first aid to Hardy and assisted the men upstairs after they were wounded. It is also clear, however, that Bragster was armed; was one of the four men who stood guard over the victims; was present while Cornbread yelled at the victims for owing him money and asked them to sign a note confessing to the debt; and urged the men to answer Cornbread's questions.[4] From this evidence the jury rea-

[4] Defendant insists that Bragster's statement urging Hardy and Conkrite to answer Cornbread's questions shows that he was trying to prevent the violence. The jury apparently did not agree and we decline to question the jury's credibility determination.

sonably could have concluded that Bragster aided and abetted his brother's extortionate conduct.

V

Cornbread was convicted of two counts of extortionate practices and received two separate sentences. He contends that the imposition of two sentences is improper, maintaining that all his activities culminated in a single attempt to collect credit. He reasons that, at most, he can be guilty of one offense.

Defendant concedes that 18 U.S.C. § 894 does not specifically define the unit of prosecution. However, he argues that, because a primary goal of § 894 is to eliminate extortionate credit transactions which fund underworld racketeers, several extortionate acts representing a course of action directed at collecting one debt constitutes one offense, regardless of the number of people or number of extensions of credit involved.

We agree that the statute is aimed at eliminating the economic support loan-sharking and other extensions of credit provide to organized crime. We do not think, however, that this fact supports defendant's argument that he is guilty of only one offense. Under § 894 an individual is guilty of extortion whenever that individual knowingly participates in "the use of any extorionate means . . . to collect or attempt to collect any extension of credit or to punish any person for nonrepayment." 18 U.S.C. § 894. We read this language to mean that § 894 prohibits extortionate conduct directed at a single individual. Thus, we hold that since two individuals were involved here, each of whom owed money to Cornbread and were victims of Cornbread's extortionate means in attempts to collect

those debts, Cornbread was properly convicted of two separate crimes.[5]

VI

The final issue is whether the trial judge abused his discretion when he imposed the maximum sentence for each conviction because he stated, just prior to the imposition of sentence:

> I consider, based upon what I've heard and what the presentence report shows, that you really have been and are a major and significant criminal force in this community, and that you have been for a number of years. I'm afraid that I have no proof of this, but that the evidence that's before me here is really the tip of the iceberg.

Tr. of sentencing hearing at 32. On the basis of this statement, Cornbread claims that the trial judge was influenced by assumptions which were wholly unsubstantiated by proof.

As this court has noted, the task of sentencing "is not a simple one for the conscientious judge, indeed [it] is an awesome responsibility, and it is easy with hindsight to seize out of context upon words, perhaps prompted by judicial soul-searching, to claim that the sentence was somehow improperly influenced." *United States* v. *Cardi*, 519 F.2d 309, 313 (7th Cir. 1975). Cornbread is indeed attempting to seize words out of context in an attempt

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[5] We do not go so far as concluding, as the government would have us do, that § 894 is violated whenever any person is a victim of extortionate means relating to the collection of a debt, regardless of whether that person is the debtor or merely a threatened third party. Resolution of the issues here does not require us to define the reach of § 894.

to show prejudice. The record indicates that prior to the imposition of sentence the trial judge carefully considered not only the attorneys' and the defendant's comments, but also the presentence report and the defendant's criminal record. The judge stated that, based on Cornbread's extensive criminal record, repeated involvement with violence and hard drugs, and long history of drug abuse and heroin addiction, he considered him a danger to the community. For all these reasons the judge concluded that the maximum sentence should be imposed. Analyzing the sentencing hearing in its entirety, we do not conclude that the judge's isolated comment indicates that Cornbread's sentence was based on improper or unreliable information. The weight to be given to the various factors relevant to sentencing is strictly committed to the trial court's discretion, and on the record before us there is no showing of a clear abuse of that discretion. *United States* v. *Main*, 598 F.2d 1086 (7th Cir.), *cert. denied*, 444 U.S. 943 (1979).

Accordingly, the judgment of the district court is

AFFIRMED.

SWYGERT, *Senior Circuit Judge.* I respectfully dissent because I believe that the denial of the continuance was in violation of the Speedy Trial Act and an abuse of discretion. The Speedy Trial Act ("the Act") serves two related functions: it protects the interests of the accused and the public in a speedy trial while allowing the accused sufficient time to prepare his defense. These appeals involve primarily the second function.

Section 3161(c)(2) of the Act provides that a trial shall not commence (absent waiver) until thirty days after the defendant first appears. This section recognizes that an

accused generally needs thirty days to prepare his defense based on the charges detailed in his indictment. Section 3161(d)(1) provides that if an indictment is dismissed on motion of the defendant and a new indictment is filed, the defendant is entitled to a new thirty-day period within which to prepare for trial. As it relates to these appeals the purpose of section 3161(d)(1) is clear. If an indictment is not sufficiently detailed to allow a defendant to prepare for trial, and the defendant files a motion for the indictment's dismissal, it would be unfair to force the defendant to trial without allowing him thirty days to prepare his defense based on a new, sufficient indictment. This is exactly the situation in the instant case.

Despite the majority's reluctance to address the issue, I think it is safe to conclude that the first indictment is obviously insufficient. "A vital function of an indictment is to 'provide such description of the particular act alleged to have been committed by the accused as will enable him properly to defend against the accusation.' " *United States* v. *Tomasetta*, 429 F.2d 978, 979 (1st Cir. 1970). To perform this function of enabling an accused to prepare his defense, the indictment "must set forth the elements of the offense charged and contain a statement of the facts and circumstances that will inform the accused of the . . . offense . . . charged." *United States* v. *Cecil*, 608 F.2d 1294, 1296 (9th Cir. 1979). The failure of an indictment to detail each element of the charged offense generally constitutes a fatal defect." *United States* v. *King*, 587 F.2d 956, 963 (9th Cir. 1978). *See, e.g., Batchelor* v. *United States*, 156 U.S. 426 (1895).

The original indictment on these appeals is insufficient because it fails to detail any of the elements of the offense[1] excluding the extortionate act itself. The indictment provided neither the name of the victim, a description of the place of the crime, nor any description of the extension of credit. In *Tomasetta, supra,* 429 F.2d 978, the First Circuit held an indictment insufficient because it failed to specify the name of the victim, the location of the alleged offense, and the means by which the threats of extortionate means were communicated. *Tomasetta* is analogous to the facts of this case. The Hortons could not have pre-

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[1] Count I of the indictment stated:

> On or about the 6th day of July, 1979, in the Central District of Illinois,
>
> EDWARD LEE HORTON
>
> knowingly, willfully and unlawfully did participate in the use of extortionate means to attempt to collect an extension of credit from an individual, whose initials are "C.H.H.", and to punish that individual for the nonrepayment thereof, in that EDWARD LEE HORTON expressly and implicitly threatened the use of violence and other means to cause harm to the person, reputation and property of the individual and did further use violence and other criminal means in causing harm to the person of that individual in that EDWARD LEE HORTON shot the individual in the left leg with a firearm.
>
> All in violation of Title 18, United States Code, Section 894.

I believe that the failure to include *any* facts regarding the extension of credit was fatal of itself. Without sufficient details, a defendant is precluded from preparing a defense showing that there was no credit or that the credit was extinguished or any other number of defenses reltaing to the extension of credit.

The original indictment was fatally flawed for another reason as well. An indictment must be sufficiently detailed to ensure that a defendant is prosecuted on the facts presented to the grand jury. *United States* v. *Cecil,* 608 F.2d 1294, 1296 (9th Cir. 1979). I can only speculate as to what facts were presented to the grand jury to prove an extension of credit.

pared an adequate defense to the first indictment if they had been given thirty days or thirty weeks. The indictment simply failed to provide them with enough information.

For this reason, the Hortons moved to have the indictment dismissed on October 23, 1980. Oral arguments were not heard on the motion to dismiss until November 14, ten days before the trial. After hinting that the indictment was likely insufficient,[2] the district court took the motion under advisement. On November 18 the Government obtained a superseding indictment which I reluctantly agree is barely sufficient.[3] The trial commenced on November 24. Because a legitimate indictment is the only fruitful starting point for trial preparation, the defendants' preparation time was reduced to six days. I believe that based on these facts, the Hortons were entitled to a new thirty-day

---

[2] Transcript, November 14, 1980, p. 40, reads in pertinent part:

> [Government counsel:] As a matter of law if the Court deems it necessary, we would be happy to respond with Seventh Circuit cases that would—would attempt to distinguish the First and Eighth Circuit cases that have been previously cited.
>
> THE COURT: You should.
>
> United States versus Tomasetta sets out the indictment which they apparently held to be bad, and it does seem to be similar, just in—I was just reading it on the bench as you were arguing. You better.

[3] I believe the majority lets the Government off too easily in stating that the superseding indictment is less detailed than desirable. I find the Government's conduct deplorable. The indictment stated that the amounts of credit and the dates of the transactions were unknown. This is not exactly true. The Government presented seven checks at trial and referred to approximately fifteen others as well. This information could easily have been included in the indictment. There is no salutary reason which explains the Government's conduct.

preparation period as required by section 3161(d)(1) of the Act.

The majority correctly states that the question of whether the thirty-day limit begins to run anew with reindictment turns on which party was responsible for dismissing the original indictment. The majority incorrectly concludes, however, that only a party who receives a favorable ruling on a motion to dismiss can be responsible for dismissing an indictment within the meaning of the Act. While purportedly protecting the letter of the Act, the majority has violated its spirit. Accepting the majority's position means that the Government can file a sham indictment containing no details of the offense and effectively prevent the accused from preparing his defense. If the accused moves to dismiss the sham indictment, the Government steps in with a superseding indictment and has the sham indictment dismissed, "technically" on the Government's motion. By proceeding along this course, as the Government did in the instant case, the Government robs the accused of his thirty-day trial preparation period. The Speedy Trial Act has then become the Speedy Conviction Act.

I believe that the Hortons were responsible for dismissing the original indictment. A literal interpretation of the Act is not mandated where it results in a blatant transgression of the purpose of the Act. A more reasonable interpretation of section 3161(d)(1) is that the words "dismissed on motion of the defendant" can refer to a situation, like that present here, where the first indictment is clearly insufficient and the defendant's motion to dismiss is the proximate cause of the superseding indictment. The Hortons' motion to dismiss the indictment was the proximate cause of the indictment's dismissal in this case.

This is clearly inferred from the circumstances surrounding the dismissal of the first indictment: the indictment was obviously insufficient, the district court indicated it was inclined to agree with the Hortons' motion to dismiss and the Government returned to the grand jury to obtain a more-detailed indictment without waiting for the court to rule on the Hortons' motion. Given these circumstances, the indictment was "dismissed on motion of the defendant" within the ambit of section 3161(d)(1). This interpretation does no harm to the language of the Act and it does preserve its intent to provide an accused with adequate preparation time.

The granting of the Hortons' motion for a continuance would not have resulted in a violation of the seventy-day indictment to trial limit imposed by the Act. The motion for a continuance could have been considered a waiver of the defendants' right to a trial within seventy days. Further, under section 3161(h)(8)(A) of the Act, the granting of a continuance can be excluded from the time within which a trial must commence.

Even if the denial of the continuance did not violate section 3161(d)(1) of the Speedy Trial Act, the denial was in contravention of section 3161(h)(8)(B)(iv) of the Act. Section 3161(h)(8)(B) contains a list of factors which a judge must consider in determining whether to grant a continuance. Subsection (iv) provides: "Whether the failure to grant such a continuance in a case, which taken as a whole, is not so unusual or so complex . . . would deny counsel for the defendant . . . the reasonable time necessary for effective preparation. . . ."

As stated above, I believe that a valid indictment is the foundation of effective trial preparation. The Hortons had but six days to prepare a defense after a valid

indictment was filed. The original indictment was of little use to them. The Hortons' strategy at trial was to deny the existence of an extension of credit. Until the superseding indictment was filed, the defendants had no idea what proof the Government would offer to show an extension of credit. Indeed, prior to the filing of the second indictment, the Hortons had been misled to believe that the credit related to a dispute arising out of stolen goods.[4] It was not until November 18 that this misconception was corrected. Denying the continuance denied the defense "the reasonable time necessary for effective preparation."

I also believe that denying the continuance constituted an abuse of discretion. The majority determined that there was no abuse of discretion because the defendants knew the names of the victims prior to the date the superseding indictment was filed. This is true, but it does not reflect the whole picture. The names of the victims were received by the defendants in a bill of particulars on November 10. At this point, the defendants had fourteen days until trial: Congress has determined that thirty days is a more appropriate preparation period. This congressional determination should not be so easily discarded.

The fourteen-day period of access to the victims' names alone might not be sufficient to establish an abuse of discretion, but it is a factor weighing in the Hortons' favor. The substantial prejudice to defendants really arises out of the paucity of detail concerning the extension of credit. The first indictment contained no details concerning the extension of credit. The superseding indictment stated that the credit involved heroin

---

[4]At a bond reduction hearing, the Government informed the district court that the extension of credit related to a dispute arising out of stolen goods.

transactions, but the dates and amounts of the credit transactions were unknown. Based on this scanty indictment, the defendants attempted to prepare a defense showing that there was no extension of credit or if there was an extension of credit, the assault was motivated for reasons other than an attempt to collect the credit. Six days was too short a period to expect counsel to prepare an adequate defense. My conclusion with respect to an abuse of discretion might be different if the superseding indictment had precisely detailed the credit transactions, but this is not the case here. The victims and the defendants on these appeals were involved in approximately one thousand heroin transactions. How was counsel expected to discover which, if any, of these transactions involved credit in a six-day period?

I have examined the same transcript (dated November 21, 1980) which the majority believes shows no prejudice and I do not agree with their conclusion. Each and every defense counsel present stated he would be prejudiced by going to trial six days after the indictment. The district court was informed that the defendants had the names of the victims only since November 10 (tr. at 28), and the judge knew that the defendants would have only six days to work with the information regarding the extension of credit (tr. at 27). On page 37 of the transcript (the majority apparently only read pages 24-30), Edward Horton's attorney states:

> They changed the indictment now. They didn't give me a date when this transaction took place, when the credit was extended. They say the exact date unknown. They are saying there was a transaction involving narcotics. I haven't had any time since getting this indictment to discuss this with my client to find out if there's any truth to this particular indict-

> ment at all, and to what his particular defense would be. Yet I am expected to go to trial Monday morning on this, and I—I just think that's grossly unfair. I won't have any chance to investigate whether he has alibi witnesses for these particular offenses, what he's talking about, whether there was any extension of credit at that time or not. It—it's just—it's inconceivable that they would want us to go to trial on such short notice and take it up.

What more could counsel have said?

The record shows that the trial judge did not carefully weigh the rights of both sides as the majority believes he did. The judge erroneously thought that the new indictment was simply a technical matter. It was not. It was the first valid indictment. Further, the judge believed that the defendants had all the information contained in the superseding indictment when the bill of particulars was filed on November 10. This is incorrect. The bill of particulars contained only the names of the defendants.

The district court and the majority has simply chosen to ignore the prejudice involved in forcing a defendant to trial within six days of receiving vital information relating to a key element of the offense charged. I believe that this is in contravention of sections 3161(d)(1) and 3161(h)(8)(B)(iv) of the Speedy Trial Act. I also believe that there was an abuse of discretion independent of the Act.

I would reverse.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

Opinion by Judge Bauer

Judge Swygert Dissenting

JUDGMENT — ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 29, 1982.

Before

Hon. Luther M. Swygert, Senior Circuit Judge
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. William J. Bauer, Circuit Judge

Nos. 81-1155 and 81-1489
UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

EDWARD LEE HORTON, a/k/a "CORNBREAD" HORTON,

No. 81-1178
UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

BRAGSTER G. HORTON,

Defendant-Appellant.

Appeals from the United States District Court for the Central District of Illinois, Springfield Division.
No. 80 CR 30062
Judge J. Waldo Ackerman

This cause was heard on the record from the United States District Court for the Central District of Illinois, Springfield Division, and was argued by counsel.

On conclusion whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the Said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this date.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 21, 1982

Before

Hon. Luther M. Swygert, Senior Judge
Hon. Wilbur F. Pell, Circuit Judge
Hon. William J. Bauer, Circuit Judge

Nos. 81-1155, 81-1178, and 81-1489

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

EDWARD LEE HORTON, a/k/a "CORNBREAD" HORTON, and BRAGSTER G. HORTON,

Defendants-Appellants.

Appeal from the United States District Court
for the Central District of Illinois, Springfield Divison.

No. 80-30062

J. Waldo Ackerman, Judge

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by Defendants-Appellants Edward Lee Horton,

a/k/a "Cornbread" Horton, and Bragster G. Horton, no judge in active service has requested a vote thereon,* and a majority of the judges on the original panel** have voted to deny a rehearing. Accordingly,

It is ordered that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable Harlington Wood, Jr., did not participate in consideration of the suggestion for rehearing *en banc*.

** The Hon. Luther M. Swygert voted to grant the petition for rehearing.

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. A-250

EDWARD LEE HORTON, aka CORNBREAD

Petitioner,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of petitioner,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 19, 1982.

/s/ John Paul Stevens

Associate Justice of the Supreme Court of the United States

Dated this 8th day of September, 1982.

Supreme Court, U.S.
FILED
JUN 30 1983
ALEXANDER L. STEVAS
CLERK

No. 82-661

In the Supreme Court of the United States

OCTOBER TERM, 1982

EDWARD LEE HORTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

PATTY MERKAMP STEMLER
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Department of Justice
Washington, D.C. 20530
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QUESTION PRESENTED

Whether the Speedy Trial Act, 18 U.S.C. (Supp. V) 3161(c)(2), prohibits commencement of trial within 30 days of the return of a superseding indictment when a defense preparation period of 30 days subsequent to an earlier indictment has already been allowed and the superseding indictment contains no new charges.

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Miscellaneous:

Comm. on the Administration of Justice, Judicial Conference of the United States, *Guidelines to the Administration of the Speedy Trial Act of 1974, as Amended* (1979 revision with Aug. 1981 amendments) 10, 18

Misner, *The 1979 Amendments to the Speedy Trial Act: Death of the Planning Process*, 32 Hastings L.J. 635 (1981) 18

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Miscellaneous—Continued:

A. Partridge, *Legislative History of Title I of the Speedy Trial Act of 1974* (Fed. Judicial Center 1980) 9

S. Rep. No. 96-212, 96th Cong., 1st Sess. (1979) 8, 12

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-681

EDWARD LEE HORTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-24) is reported at 676 F.2d 1165.

JURISDICTION

The judgment of the court of appeals (Pet. App. 25-26) was entered on April 29, 1982, and a petition for rehearing was denied (Pet. App. 27-28) on July 21, 1982. On September 8, 1982, Justice Stevens extended the time for filing of a petition for a writ of certiorari to and including October 19, 1982, and the petition was filed that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of Illinois, petitioner was convicted of extortionate collection practices (Counts 1 and 4), in violation of 18 U.S.C. 894, and use of a firearm in commission of a felony (Counts 3 and 6), in violation of 18 U.S.C. 924(c). He was sentenced to consecutive terms of 20 years' imprisonment on each of the extortion counts and 10 years' imprisonment on each of the firearm counts, for a total sentence of 60 years. The court of appeals affirmed.

1. Briefly summarized, the evidence at trial showed that petitioner frequently supplied heroin to Curtis Hardy and James Conkrite. Hardy and Conkrite sometimes paid for the heroin with bad checks, and in July 1979 they owed petitioner between $700 and $800. Early on July 6, 1979, petitioner, aided by his brother Bragster, forced the two men into his basement at gunpoint, demanded payment of $3,000, and instructed Hardy and Conkrite to sign a statement confessing their indebtedness. When they did not comply, he screamed at them and abused them verbally, beat them with a blackjack, and ordered the men to shoot each other. Petitioner also placed a gun at Conkrite's head and pulled the trigger, but the gun failed to fire. Thereafter he shot each man in the left leg (Trial Tr. 54-62, 66-73, 75-91, 187-210).

Through cross-examination of Hardy and Conkrite, petitioner attempted to show that he had shot them because of a dispute about a washing machine (Trial Tr. 122, 227, 244-245).

2. On appeal, petitioner alleged that he was tried *sooner* than is permitted by Title I of the Speedy Trial Act, 18 U.S.C. (& Supp. V) 3161 *et seq.* Petitioner was originally charged in 10 counts of a 15-count indictment returned on September 24, 1980. Thereafter petitioner moved to dismiss

the indictment on the ground that the charges were not sufficiently detailed.[1] While the motion was under advisement, the government provided petitioner with the grand jury testimony of the two victims, which disclosed that petitioner shot the victims while attempting to collect past heroin debts (11-14-80 Tr. 11, 40; 11-21-80 Tr. 28, 36-37).

Subsequently, on November 18, 1980, a superseding indictment was returned by the grand jury. The total number of counts was reduced from 15 to six, and the number of counts charging petitioner from 10 to four. Although the extortion counts were more detailed than the counts in the original indictment,[2] they contained no

---

[1]The original indictment identified the victims by their initials. In a Bill of Particulars filed on November 10, 1980, the government gave petitioner the full names of the victims. The victims were available to be interviewed by defense counsel at any time.

[2]For instance, Count One in the original indictment charged:

> On or about the 6th day of July, 1979, in the Central District of Illinois,
>
> EDWARD LEE HORTON,
>
> knowingly, willfully and unlawfully did participate in the use of extortionate means to attempt to collect an extension of credit from an individual, whose initials are "C.H.H." and to punish that individual for the nonrepayment thereof, in that EDWARD LEE HORTON expressly and implicitly threatened the use of violence and other criminal means to cause harm to the person, reputation and property of the individual and did further use violence and other criminal means in causing harm to the person of that individual in that EDWARD LEE HORTON shot the individual in the left leg with a firearm.
>
> All in violation of Title 18, United States Code, Section 894.

Count One of the superseding indictment charged:

> *COUNT 1*
>
> On or about the 6th day of July, 1979, in the Central District of Illinois, at 2128 East Monroe, Springfield, Illinois,

information that had not already been provided petitioner (11-21-80 Tr. 16, 27-30, 36-38, 44). On November 21, 1980, the original indictment was dismissed on motion of the government, and trial upon the superseding indictment was scheduled to commence on November 24.[3] Citing Section 3161(c)(2) of the Speedy Trial Act,[4] petitioner sought a continuance, arguing that he was entitled to a new 30-day defense-preparation period following return of the superseding indictment (compare note 3, *supra*). The district court denied the motion on the ground that the superseding indictment contained no new charges and that petitioner

---

EDWARD LEE HORTON,

having on previous occasions, the exact dates unknown, extended credit to Curtis H. Hardy arising from the sale of narcotics, did knowingly, willfully and unlawfully participate in the use of extortionate means to attempt to collect from Curtis H. Hardy said extension of credit, the amount of which was in dispute, and to punish Curtis H. Hardy for the nonrepayment thereof, in that EDWARD LEE HORTON expressly and implicitly threatened the use of violence and other criminal means to cause harm to the person, reputation and property of Curtis H. Hardy and did further use violence and other criminal means in causing harm to the person of Curtis H. Hardy in that EDWARD LEE HORTON shot Curtis H. Hardy in the left leg with a firearm.

All in violation of Title 18, United States Code, Section 894.

[3]The government had advised the court that trial should not be commenced earlier, so as to make sure that 30 days of pretrial preparation time were allowed to the defendant, as required by 18 U.S.C. (Supp. V) 3161(c)(2). The government reckoned the 30-day period from the date of the original indictment, but noting that it was arguable that the 30-day period was enlarged by a period when petitioner was out of the district receiving medical treatment, suggested November 24 as a safe date for trial.

[4]18 U.S.C. (Supp. V) 3161(c)(2) provides:

> Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

had adequate time to prepare for trial and would not be prejudiced by proceeding on the scheduled trial date (11-21-80 Tr. 16, 27-30, 44). Petitioner was tried on November 24, 61 days after the return of the original indictment, and was convicted on all four counts.

A divided court of appeals affirmed. Speaking for the majority, Judge Bauer noted (Pet. App. 7) that "[b]oth parties agree that the question of whether [petitioner was entitled to a new 30-day defense preparation period under Section 3161(c)(2)] turns on which party is responsible for dismissal of the original indictment, but they disagree as to which party was responsible for the dismissal in this case." The court observed that under 18 U.S.C. (Supp. V) 3161(d)(1),[5] if the original indictment is dismissed on the defendant's motion, the defendant is "entitled to another thirty day period before trial," whereas "subsection (d) does not apply if the government obtains the dismissal" (Pet. App. 7). The court of appeals noted that petitioner conceded that "technically the indictment was dismissed on the government's motion" (Pet. App. 8), and rejected his argument that because the filing of the motion to dismiss seemingly precipitated the superseding indictment the original indictment should be deemed to have been dismissed on petitioner's motion (*ibid.*):

> The mere filing of a defendant's motion to dismiss an indictment does not trigger subsection (d)(1); the right to a new thirty day time period is dependent upon a

---

[5] 18 U.S.C. (Supp. V) 3161(d)(1) provides in pertinent part:

> If any indictment or information is dismissed upon motion of the defendant, * * * and thereafter * * * an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent * * * indictment, or information, as the case may be.

> favorable ruling on that motion. In this case, although [petitioner] filed his motion before the government filed a superseding indictment and moved to dismiss the original indictment, the trial judge never decided [petitioner's] motion. While we note that the trial judge indicated some preliminary doubts as to whether the original indictment was sufficient, we decline to speculate as to how the motion would have ultimately been resolved. Accordingly, the original indictment was not dismissed on the defendant's motion and, thus § 3161(d)(1) is not applicable.

In this connection the court pointed to 18 U.S.C. 3161(h)(6),[6] which provides that the period between dismissal upon government motion of an indictment and the filing of a subsequent indictment is excludable from Speedy Trial Act reckoning. The court concluded that "a fair implication of the statute is that [when dismissal occurs on government motion] * * * the time period [for trial] begins to run with the first indictment" (Pet. App. 9).

The court also held (Pet. App. 9-10) that, because petitioner suffered no prejudice from filing of the superseding

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[6] 18 U.S.C. (& Supp. V) 3161(h) provides in pertinent part:

> The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:
>
> * * * * *
>
> (6) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

indictment and commencement of trial thereafter, the district court did not err in refusing to exercise its discretion to extend the trial date.

Judge Swygert dissented (Pet. App. 16-24). He reasoned (*id.* at 20):

> The majority correctly states that the question of whether the thirty-day limit begins to run anew with reindictment turns on which party was responsible for dismissing the original indictment. The majority incorrectly concludes, however, that only a party who receives a favorable ruling on a motion to dismiss can be responsible for dismissing an indictment within the meaning of the Act.

In the circumstances of this case, including what Judge Swygert took to be the "obvious insufficien[cy]" (*id.* at 17) of the first indictment, he concluded that "the defendant's motion to dismiss is the proximate cause of the superseding indictment," and accordingly that the original indictment had been "dismissed on motion of the defendant" within the meaning of 18 U.S.C. (Supp. V) 3161(d)(1) (Pet. App. 20-21). Judge Swygert also concluded that the district court should have granted petitioner a discretionary "ends of justice" continuance of the trial date pursuant to 18 U.S.C. (Supp. V) 3161(h)(8)(B)(iv) (Pet. App. 21-24).

A petition for rehearing with a suggestion for en banc consideration was filed by petitioner. Citing the Ninth Circuit's decision in *United States* v. *Arkus*, 675 F.2d 245 (1982), which had been rendered six days before the opinion was filed in this case, petitioner argued for the first time: *first*, that a new 30-day defense preparation period was required "even if the Government obtained voluntary dismissal of a prior indictment" (Rehearing Pet. 3-5), and *second*, that the periods of delay excludable from computation of the last permissible date for trial under the Speedy

Trial Act also apply to the 30-day minimum trial preparation period and that he therefore had been tried unlawfully early, in any event.[7] Pursuant to Fed. R. App. P. 40(a), the court requested a response to the rehearing petition. In its response, the government explained that the purported conflict between Arkus and this case was essentially illusory (see pages 14-18, *infra*), that the petitioner had not preserved the argument based upon allegedly excludable delay, and that because petitioner had not been prejudiced, any error was harmless and he accordingly was not, in any event, entitled to a new trial. The petition for rehearing was denied (Pet. App. 27-28).

ARGUMENT

The court below correctly rejected petitioner's contention that he could not be tried within 30 days of the superseding indictment.[8]

1. As originally enacted, Title I of the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.*, established maximum time limits within which a case must be tried: it set no minimum limits. See 18 U.S.C. (& Supp. V) 3161(c). In 1979, however, Congress amended the Act to "assure[] the defendant some minimal time to prepare." S. Rep. No. 96-212, 96th Cong., 1st Sess. 32 (1979). Section 3161(c)(2), added by the 1979 Amendments, prohibits the commencement of trial "less than thirty days from the date on which the defendant *first*

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[7]Petitioner claimed that 48 days of the 61-day period from original indictment to trial were excludable on this basis. Compare page 4 note 3, *supra*.

[8]Petitioner's claim is based solely on the Speedy Trial Act. He does not allege that he was denied the effective assistance of counsel guaranteed by the Sixth Amendment by reason of the denial of his motion to continue the trial. Accordingly, there is no reason to hold this case pending disposition of either *Morris* v. *Slappy*, cert. granted, 456 U.S. 904 (1982), or *United States* v. *Cronic*, petition for cert. pending, No. 82-660 (filed Oct. 14, 1982).

appears through counsel * * *" [emphasis supplied]. Thus, under the plain language of the amended statute, the 30-day period began for petitioner at his arraignment on September 25, 1980, and ended on October 25, 1980.

There is nothing in either the statute or its legislative history that supports petitioner's claim that a new 30-day period began to run from the date that the superseding indictment was filed. See generally, A. Partridge, *Legislative History of Title I of the Speedy Trial Act of 1974*, at 69-75 (Fed. Judicial Center 1980). As the court of appeals noted (Pet. App. 7), under Section 3161(d)(1) when reindictment follows granting of a defendant's motion to dismiss, the government is allowed a new 70-day period to bring the defendant to trial and a new 30-day defense preparation period is also required. By contrast, Section 3161(d)(1) has no application when a superseding indictment is returned following voluntary dismissal of an earlier indictment by the government,[9] and no other provision of the Act provides for a new 30-day period in that situation.

Indeed, Section 3161(h)(6) strongly suggests that no such period is to be allowed. That section provides for exclusion of the period between dismissal of an indictment upon government motion and arraignment upon a subsequent indictment, in determining the 70-day period within which trial must commence. In requiring exclusion of the time between indictments, Congress plainly assumed that a single time period, beginning with arraignment upon the original indictment, governs the maximum period within which

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[9]It is clear that this omission does not result from an oversight. Section 3161(d)(1) triggers a new 30-day period upon refiling of charges following dismissal of a *complaint*, regardless of which party is responsible for dismissal, whereas a new 30-day period is triggered by filing of charges after dismissal of an indictment only when the dismissal is "upon motion of the defendant."

trial must be commenced. And the courts of appeals that have considered the issue have agreed that reindictment after a voluntary dismissal does not trigger a new 70-day period for trial. See *United States* v. *Dennis*, 625 F.2d 782, 793 (8th Cir. 1980); see also *United States* v. *Budzyna*, 666 F.2d 666, 670 (1st Cir. 1981). The same rule should apply to the 30-day minimum defense preparation period. Unless the 30-day period and the 70-day maximum period for trial begin to run concurrently a timely trial will be impossible where a superseding indictment is returned more than 41 days after filing of the original indictment, for by the time the 30-day period is allowed to accrue the 70-day period may have elapsed (see page 17, *infra*). The Committee on the Administration of the Criminal Law of the Judicial Conference of the United States has recognized this in its *Guidelines to the Administration of the Speedy Trial Act of 1974*, at 14 (1979 revision, with Aug. 1981 amendments):

> In the opinion of the Committee, the [defense-preparation] period does not begin to run anew when superseding indictments are filed in circumstances in which the seventy-day time limit is determined by reference to the original indictment or information. See Section 3161(h)(6). Nor does a new thirty-day minimum period begin to run if prosecution is resumed on an original indictment or information following a mistrial, appeal, or withdrawal of a guilty plea. In all of these situations, the trial court should use its scheduling discretion to ensure that the defense has time to prepare in the circumstances of the particular case.

2. Renewing the only contention timely raised in the court of appeals, petitioner claims (Pet. 12-20) that the filing of the superseding indictment was prompted by his motion to dismiss, that the original indictment was legally insufficient, and that accordingly, under an appropriately

"flexible" interpretation of Section 3161(d)(1), a new 30-day trial preparation period running from the date of reindictment should be allowed. Petitioner's argument is contrary to the plain language of Section 3161(d)(1), which refers only to dismissals "upon motion of the defendant." The distinction between a dismissal upon defense motion and one on government motion is a familiar one, and there is no reason to assume that Congress meant to create a novel and different distinction when it used the term dismissal "upon motion of the defendant" in the Speedy Trial Act.

Moreover, if the petitioner's contention is accepted, the district courts and courts of appeals would have to determine the sufficiency of indictments upon which no trial is to be had. Further, it would be extremely difficult for the courts to determine what prompted the filing of a superseding indictment. In cases where a motion to dismiss has been filed, the prosecutor's motivations in filing a superseding indictment are often mixed. He may recognize the possibility that the motion has merit. He may feel that the motion will be granted, though the dismissal would be reversed upon appeal. He may wish simply to avoid unnecessary litigation, even though the indictment is believed to be entirely sufficient. Any attempt to sort out these motivations so as to determine whether the government's dismissal should be deemed to be "upon motion of the defendant" would impose substantial burdens upon the courts. It might also discourage filing of superseding indictments and encourage litigation about the sufficiency of indictments in marginal cases.

Petitioner's reliance upon *United States* v. *Rabb*, 680 F.2d 294 (3d Cir. 1982) (Pet. 13-15) and upon legislative history said to reflect Congress' desire that the Speedy Trial Act be interpreted in a flexible manner (Pet. 12-13), is misplaced. Read in context, the legislative history quoted

by petitioner lends his arguments no support.[10] *United States* v. *Rabb, supra,* does not conflict with the decision below in any respect. The only question in *Rabb* was whether an indictment timely returned by a grand jury whose term had expired tolled the arrest-to-indictment period of the Speedy Trial Act, 18 U.S.C. 3161(b),[11] so that a superseding indictment returned later on, when the error

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[10]The quotations petitioner features are taken from a portion of the Senate Committee Report on the 1979 Speedy Trial Act Amendments rejecting the suggestions of the Department of Justice and the Judicial Conference that a general relaxation of the deadlines prescribed by the Act was needed. The Committee explained that the existing provisions for exclusion of delay had been construed by the courts in an unreasonably strict manner, and that if these provisions were given their intended scope, no general relaxation of deadlines would be needed. S. Rep. No. 96-212, *supra,* at 17-20. The Committee's comments plainly do not suggest that the defense preparation provision — which was not even mentioned in this context — should be interpreted "flexibly" so as to impose an additional *constraint* upon prosecutors and courts in scheduling trials.

We note that in addition to enacting the automatic 30-day trial preparation period, Congress in 1979 recognized that additional preparation time would be needed in some cases. Thus Congress also amended the Act to permit a discretionary "ends of justice" continuance to afford defense counsel "reasonable time necessary for effective preparation." 18 U.S.C. (Supp. V) 3161(h)(8)(B)(iv); see *United States* v. *Aviles,* 623 F.2d 1192, 1196 (7th Cir. 1980). The latter provision gives the Act flexibility, and will adequately protect a defendant who legitimately needs more time because of filing of a superseding indictment. Accordingly, there is no reason to extend the application of the automatic 30-day preparation period beyond the plain language of Section 3161(c)(2). See pages 8-9, *supra.* The court of appeals held (Pet. App. 9-10) that petitioner was not entitled to a continuance under Section 3161(h)(8)(B)(iv). Petitioner has not sought review of that fact-bound determination.

[11]18 U.S.C. 3161(b) provides in pertinent part:

> (b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges.

had been discovered, was not to be deemed untimely. The Third Circuit answered the question affirmatively, concluding that absent a showing of bad faith on the part of the government or prejudice to a defendant an indictment returned by an expired grand jury tolls the 30-day limit of Section 3161(b), if followed by a valid indictment charging the same offense.[12]

Contrary to petitioner's submission (Pet. 15), moreover, the court of appeals specifically determined (Pet. App. 9-10) that his reindictment, and the commencement of trial on November 24, 1980, in no respect prejudiced his ability to prepare for trial, because the government had previously provided him with the information contained in the superseding indictment, and because no new charges were contained in the second indictment (Pet. App. 9-10). See page 3 & note 1, *supra*. Accordingly there is no merit to petitioner's contention (Pet. 16-20) that the decision of the court of appeals deprived him of an adequate opportunity to prepare for trial.[13]

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[12]Petitioner points to language in *Rabb* explaining that the pertinent statutory language was to be read with an eye to the legislative purpose and to the statutory setting (Pet. 14-15). The court was careful to explain (680 F.2d at 296), however, that the pertinent statutory language was "unclear." Here, by contrast, the meaning of the statute is clear.

[13]*United States* v. *MacDonald*, No. 80-1582 (Mar. 31, 1982), on which petitioner relies (Pet. 16-17), is wholly inapposite. In *MacDonald*, this Court held that the Sixth Amendment right to a speedy trial is not extant during the period between dismissal and reinstitution of criminal charges. The Court noted that the Army did not dismiss the military charges first lodged against MacDonald in a deliberate attempt to undermine MacDonald's right to a *speedy* trial. Slip op. 9 n.12. This comment does not aid petitioner, who does not claim that his right to a speedy trial was subverted. On the contrary, petitioner contends that he was tried too soon. Petitioner's charge (Pet. 17) that the government dismissed the original indictment and filed a superseding indictment "solely" to deny him an adequate period of preparation for trial is

3. Petitioner claims (Pet. 20-22) that the decision of the court of appeals conflicts with the decision of the Ninth Circuit in *United States* v. *Arkus*, 675 F.2d 245 (1982), in two different respects.[14] No conflict warranting review at this time exists. In order to make clear why this is so we first set out in some detail the unusual facts of *Arkus*, as well as the decision of the court of appeals in that case.

a. In *Arkus* the original indictment of the defendant was dismissed upon motion of the government shortly before the scheduled trial date, when the government learned of the death of a key witness. Eighty-one days later the defendant was reindicted upon the same charges and was rearraigned. Because only six days of nonexcludable time were left in the 70-day trial period fixed by Section 3161(c)(1) when the first indictment was dismissed, the district court was told that the case required especially prompt scheduling for trial. See 18 U.S.C. 3161(h)(6) (see pages 9-10, *supra*). In addition the prosecutor informed the court that under Section 3161(c)(2) Arkus could not be *compelled* to go to trial sooner than 30 days after the date of the second arraignment. Because the defendant declined to waive his "right" to a new 30-day trial preparation period, but also declined to waive his right to be tried within 70 nonexcludable days of the original arraignment, the district court fixed a trial date 36 days after the date of the second arraignment. In effect the district court treated the new 30-day preparation period as tolling the running of the remaining six days of the 70-day period within which Arkus had to be brought to trial. 675 F.2d at 246-247.

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without support in the record or elsewhere. This claim is also inconsistent with petitioner's theory that the original indictment was dismissed because his motion to dismiss it was meritorious.

[14]The arguments pressed by petitioner in this connection are those first raised below upon petition for rehearing. See pages 7-8, *supra*.

Twenty days before the scheduled trial date — in the midst of the trial preparation period allowed him by the district court — Arkus moved to dismiss the indictment, claiming he had not been brought to trial *soon enough* because 70 nonexcludable days had elapsed. The district court denied that motion. Arkus' trial commenced 36 days after the second arraignment. 675 F.2d at 247.

On defendant's appeal from his conviction, the court of appeals affirmed. Adopting the government's argument on appeal,[15] the court of appeals concluded that under Section 3161(c)(2) the defendant was entitled to a new 30-day trial preparation period, and that it was accordingly proper to try him at the end of that period, notwithstanding the expiration of the 70 nonexcludable days allowed the government to bring him to trial. 675 F.2d at 248.

The court concluded, however, that contrary to the district court's reckoning, the 30-day period was not to be treated as a toll and thus that the "district court erred * * * in adding the six days left after the original indictment" to the 30-day period. Instead the district court should have treated those periods as running concurrently, and commenced trial upon the expiration of the 30-day period. 675 F.2d at 248. Even though Arkus' trial did not commence until six days after that period, the court of appeals concluded that Arkus' trial was not untimely, reasoning that the 30-day trial preparation period had been enlarged by the exclusion of the 20 days during which Arkus' motion to dismiss was pending (*ibid.*).

b. The reasoning of *Arkus*, while inconsistent in one respect with the decision below, does not create a conflict warranting review at this time. To be sure, even though the

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[15]Appellee's Br. at 6-8 & n.5, *United States* v. *Arkus*, No. 81-1191 (9th Cir.).

original indictment was dismissed on the government's motion, the Ninth Circuit indicated that the defendant was entitled to a new 30-day period running from arraignment upon the second indictment. 675 F.2d at 248. That view, which we believe to be incorrect, was urged upon the court by the United States Attorney. The defendant Arkus never took the position that he was not entitled to a new trial preparation period, or that such a period could not toll or extend the 70-day period allowed for trial. Accordingly, the court of appeals' analysis was not illuminated by adversary presentations. See *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). The views of the *Arkus* panel thus do not create a conflict that warrants review by this Court.[16]

c. For the reasons already outlined (see pages 8-10, *supra*) the Ninth Circuit's analysis in *Arkus* is unsound.[17] The only support the Ninth Circuit adduced for its decision is legislative history which indicates generally that the

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[16]In support of its analysis the *Arkus* court stressed the possibility that a "considerable" period of time may elapse between a dismissal of an indictment and filing of a subsequent indictment. 675 F.2d at 248. Here, of course, there was no such gap; the superseding indictment was filed before dismissal of the initial indictment. Where there is no gap there is no possibility that any of the momentum of defense preparation will be lost, while the defense is lulled into thinking that the prosecution has been abandoned. Thus, even if, contrary to our submission, 18 U.S.C. (Supp. V) 3161(c)(2) may in some circumstances be applicable to a renewed indictment, it can have no application upon the facts of this case.

[17]As the certiorari petition indicates (Pet. 11), the government's response to the rehearing petition in the court below reflected the concession, made after consultation with this Office, that the position argued to the Ninth Circuit by the government in *Arkus* was legally unsound. The response also explains that the result in *Arkus* was correct for reasons other than those stated by the *Arkus* panel. No petition for rehearing or petition for a writ of certiorari was filed in *Arkus*.

purpose of Section 3161(c)(2) is to assure adequate time for trial preparation to defendants. The court did not consider whether other provisions of the Act such as 18 U.S.C. (Supp. V) 3161(h)(8)(B)(iv) (see page 12 note 10, *supra*) were adequate to meet the statutory objective in those cases where reindictment makes additional defense preparation time necessary.

Further, the approach adopted by the Ninth Circuit renders the Speedy Trial Act unworkable. Where, as in *Arkus*, an initial indictment is dismissed on government motion after the 40th day for trial thereunder, the balance of the 70-day trial period expires before the new 30-day defense preparation period is over (see page 10, *supra*). That result can be avoided, of course, if, as the district court assumed in *Arkus*, the new defense preparation period is excludable from computation of the 70-day trial period. But no authority exists in the statute for this result. Nor is there any statutory basis whatsoever for the Ninth Circuit's alternative view, that trial may be held after the 70-day period, at the end of the 30-day period.[18]

d. Petitioner also claims (Pet. 21-22) that the decision of the court below conflicts with the *Arkus* court's view (675 F.2d at 248 n.4; see page 15, *supra*) that delays that are excludable from the government's 70-day period in which to bring a defendant to trial also enlarge the defendant's minimum preparation period. No such conflict exists.

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[18]The Ninth Circuit's reconstruction of the Act is doubly unworkable because the necessary effect is that only one day, the 30th day after reindictment, is a permissible trial date.

The court below did not address this question, because petitioner did not argue in that court or in the district court that even if reckoned from the date of the original arraignment the necessary 30-day period had not been allowed. This question was first raised in the petition for rehearing (see pages 7-8, *supra*). Since the opinion intimates no view on this issue, no conflict requiring resolution exists.[19]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[19]Petitioner correctly observes (Pet. 22 n.10) that the Fourth Circuit has recently held that the 30-day period should be calculated without reference to excludable delay. See *United States* v. *Wooten*, 688 F.2d 941, 949-951 (4th Cir. 1982). Accord: Misner, *The 1979 Amendments to the Speedy Trial Act: Death of the Planning Process*, 32 Hastings L.J. 635, 642-653 (1981); *Guidelines to the Administration of the Speedy Trial Act of 1974*, *supra*, at 12. For the reasons well-stated by the Fourth Circuit, which fully took account of the legislative history upon which the Ninth Circuit and petitioner rely, we believe that *Wooten* was correctly decided. Although the issue may at some time warrant review in this Court, since the issue was not timely raised or decided below, this case does not afford a suitable occasion for such review.